United Nations AT/DEC/1108

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1108

Case No. 1228: ASOMBANG Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, Vice-President, presiding; Mr. Omer Yousif Bireedo; Ms. Jacqueline R. Scott;

Whereas at the request of Wilfred Asombang, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 31 October 2001 the time limit for the filing of an application with the Tribunal;

Whereas, on 31 October 2001, the Applicant filed an Application containing pleas which read as follows:

"**II: PLEAS**

7. ...

8. On the merits, the Applicant respectfully requests the Tribunal *to find*:

(a) that the Secretary-General's decision was not commensurate with the severity of the harm done;

(b) that the amount of $3,000 is inadequate;

(c) that the Respondent misled the [Joint Appeals Board (JAB)] to conclude that the Applicant's due process rights had not been violated;

(d) that the Applicant's due process rights have been violated in the appointment and promotion process ...

...

9. Where after the Applicant most respectfully requests the Administrative Tribunal *to order*:

(a) that for the severity of damage caused by the breach of substantive procedures, the amount of the compensation of $3,000 recommended by the JAB be augmented by an additional $2,000;

(b) that as a consequence of lost earnings that will impact adversely on Applicant's retirement benefits, the Applicant be compensated an additional $5,000."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 March 2002 and periodically thereafter until 15 November 2002;

Whereas at the request of the Respondent, on 13 November 2002 the President of the Tribunal suspended the time limit for filing a Respondent's answer;

Whereas the Respondent filed his Answer on 8 January 2003;

Whereas the Applicant filed Written Observations on 28 April 2003;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations Economic Commission for Africa (ECA) as a Public Administration Officer in Addis Ababa, Ethiopia on 30 October 1989, on a two-year fixed-term contract at the P-3 level. Promoted to the P-4 level effective 1 June 1991, his fixed-term contract was made permanent on 30 October 1995. The Applicant served on mission detail between September 1994 and August 1996, when he returned to his position as Public Administration Officer, ECA.

In April 1997, the vacant post of Chief of Personnel Section, International Criminal Tribunal for Rwanda (ICTR), was advertised. The vacancy announcement specified "Fluency in English or French. Working knowledge of the other highly desirable". Pending the recruitment exercise, ICTR temporarily assigned the Acting Chief, Personnel Section, ICTR, to the vacant position. On 1 May 1997, the Applicant applied for the post, stating that he had a working knowledge of French.

Twelve of the 35 applications were retained for further evaluation; nine external candidates and three internal. The Acting Chief was not one of the twelve.

By letter dated 13 May 1997, the Applicant was advised by OHRM that his qualifications for the post would be considered along with other candidates in accordance with United Nations policies and eligibility criteria.

On 29 July 1997, the Chief of Administration, ICTR, wrote to the Registrar, ICTR, evaluating the candidates and stating:

> "as there is a need to maintain the present momentum, and consolidate the gains so far achieved, this Office finds it difficult to make a recommendation for the recruitment of an external candidate to the post of Chief, Personnel Section. Furthermore, the Tribunal cannot, at present, take time to train a Chief of Personnel in the mores of the UN. Of the internal candidates, who submitted their application, [the Applicant's] experience in personnel matters is quite limited, in that his past experience has been more in training and not recruitment or staff administration. Moreover, he appears to work only in English. As it is important to have someone in this post who can communicate directly with our staff in Kigali (...), it would be counter-productive to engage him. [...]
>
> In light of the foregoing, I would recommend that the present Acting Chief, Personnel Section who, since he joined the Tribunal in early May 1997, has proved very adept at ensuring the smooth functioning of our Personnel Section, be confirmed as Chief of Personnel Section at ICTR".

On 31 July 1997, the Chief of Administration advised the Chief, Overseas Service Cluster, Office of Human Resources Management (OHRM) of the Registrar's decision to confirm the Acting Chief as Chief of Personnel, and requesting the approval of the Assistant Secretary-General, OHRM. The Registrar, ICTR, was informed on 25 August that the Assistant Secretary-General, OHRM, had approved the appointment. On 23 March 1998, the Applicant was advised accordingly

With respect to the Applicant's inquiry about the ICTR promotion process, the Chief of Administration, ICTR, informed the Applicant in a memorandum dated 14 April 1998, that during the period in question, "ICTR did not have delegation of authority for human resources management matters" but was administered by OHRM. However, the Registrar had the authority to review job applications and forward his decision with respect to the appointment of a suitable candidate to OHRM.

On 22 May 1998, the Applicant requested administrative review claiming that his application had not been afforded "proper and fair consideration".

On 16 June 1998, the Chief of Administration, advised the Applicant that the unique problems and operational requirements of ICTR led to the appointment of a candidate already in service.

On 8 October 1998, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 8 January 2001. Its considerations, and conclusions and recommendations read, in part, as follows:

> "***Considerations***
>
> ...
>
> 22. The Panel examined the Appellant's contention that the evaluation and selection process which led to the decision to appoint [the Acting Chief] to the post in question was marred by serious procedural irregularities which led the Secretary-General to deny the Appellant fair consideration. In this context, the Panel considered the Appellant's contention that his application was not properly and fairly considered, and [the Acting Chief], a pre-selected candidate, was given the post. This, therefore in his view, constituted an infringement of Administrative Instruction ST/AI/413, para. 9. The Panel also examined the Appellant's contention that it appeared that [the Acting Chief] did not properly apply for the Vacancy Announcement, since he was not among the 12 candidates who were considered suitable for the post. The Panel looked into the Appellant's contention that he was not invited by the Administration to provide additional information relevant to his suitability for the vacancy, in violation of paragraph 11 of ST/AI/413.
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> ...
>
> 26. ... [The] Chief of Administration of ICTR informed the Panel (...) that at the time of the evaluation of the candidates for the post in question, [the Acting Chief] was not among the 12 applicants originally evaluated. He was later recommended as collateral, and found to be suitable for the position in accordance with ST/AI/390. As to the failure of the Respondent to invite the Appellant to provide the additional information relevant to his suitability for the vacancy, [the Chief of Administration] explained that this 'was an oversight from the Appointment and Promotion Board. It is regretted.'
>
> 27. In view of the above, the Panel found that based on the particular situation of ICTR and its needs, the appointment of [the Acting Chief] was justified for the post in question. The Panel, nevertheless, was troubled by the failure of the Respondent to invite the Appellant to provide the additional information relevant to his suitability for the vacancy, which violated ST/AI/413. The Panel had no assurances to imply that, had the Appellant submitted the additional information, he would have been selected for the post in question. The Panel, however, acknowledged that the Appellant had the right to submit the additional information, and this right was not respected by the Organization.

Conclusions and Recommendations

28. The Panel concluded that the candidature of the Appellant to the post in question had not been given full consideration, due to the failure of the Respondent to invite the Appellant to provide the additional information relevant to his suitability for the vacancy. In view of the foregoing, the Panel *agreed unanimously* to recommend an award of compensatory damage equivalent to $3,000.

29. The Panel made no other recommendation."

On 3 April 2001, the Under Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him that the Secretary-General had decided to accept the JAB's conclusion and recommendation and to compensate him $3000.

On 31 October 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The compensation recommended by the JAB was inadequate, as it overlooked the procedural irregularities in the Applicant's case.

2. The Applicant's candidacy for the post in question was never given full and fair consideration as ICTR did not constitute an APB to review the applications.

3. Once the Acting Chief had been installed, no urgent need to fill the post justified non-compliance with the Regulations and Rules.

Whereas the Respondent's principal contentions are:

1. The Applicant has been adequately compensated for the Administration's failure to invite him to submit additional information in connection with the subject promotion exercise.

2. The Tribunal will not substitute its judgement for that of the Secretary-General in matters relating to the efficiency or relative efficiency of candidates for promotion.

The Tribunal, having deliberated from 2 to 21 July 2003, now pronounces the following Judgement:

I. The Applicant appeals the Respondent's decision of 3 April 2001, accepting the JAB's recommendation with respect to Applicant's claim of being denied full and fair consideration, in connection with his application for promotion to a P-5 position. The Applicant claims that the Respondent did not properly compensate him for the Administration's failure to invite him to submit additional information during the course of the promotion process, denying him full and fair consideration and violating his due process rights.

II. In April 1997, the post of Chief of Personnel, ICTR became vacant. ICTR temporarily assigned the Acting Chief to the position with the approval of OHRM, pending the recruitment of a candidate.

The post was advertised, with an application deadline of 28 May 1997, and on 1 May, the Applicant applied. Out of 35 applications, 12 applications were retained for further evaluation: nine were external and three internal.

In a letter dated 13 May 1997, OHRM informed the Applicant that, "[his] qualifications will be considered in accordance with existing United Nations policies, eligibility criteria and the other requirements of the post, along with the qualifications of other candidates."

In a memorandum from the Chief of Administration, ICTR, to the Registrar, ICTR, dated 29 July 1997, the former summarized his evaluation of the candidates:

> "...[This Office finds it difficult to make a recommendation for the recruitment of an external candidate to the post of Chief, Personnel Section. ... I would recommend that the present Acting Chief, Personnel Section who, since he joined the Tribunal in early May 1997, has proved very adept at ensuring the smooth functioning of our Personnel Section be confirmed as Chief of Personnel Section at ICTR."

On 31 July 1997, the Chief of Administration recommended that, for the reasons stated in his memorandum of 29 July 1997, the Acting Chief, Personnel Section, ICTR, be confirmed as Chief of Personnel.

On 22 May 1998, the Applicant filed a request for review against the administrative decision.

On 8 October 1998, the Applicant appealed to the JAB. On 8 January 2001, the JAB panel concluded that the Applicant had indeed not been afforded full and fair consideration and recommended that compensation be paid. The Respondent adopted the JAB's recommendation. The Applicant appeals the decision of the Respondent, claiming that the compensation he received is insufficient.

III. The Applicant claims that the Organization's failure to observe basic requirements of due process and full and fair consideration merits an award of additional compensation over and above the amount recommended by the JAB, alleging in support of his position that the Administration itself admitted its failure to offer him the opportunity to submit additional information in connection with his candidacy for the post.

The Applicant cites the following language in the JAB report:

> "The panel concluded that the candidature of the [Applicant] to the post in question had not been given full consideration, due to the failure of the Respondent to invite the [Applicant] to provide the additional information relevant to his suitability for the vacancy. In view of the foregoing, the Panel agreed unanimously to recommend an award of compensatory damage equivalent to $3,000."

The Respondent, while acknowledging the Administrations' errors, nevertheless contends that the Applicant was adequately compensated by the award of $3,000. In support of this position, the Respondent states as follows:

> "... The Secretary-General has examined [the Applicant's] case in the light of the Board's report. He has taken note of the Board's finding that, based on the particular situation of ICTR and its needs, the [non-selection of the Applicant] for the post in question was justified. However, the Board also found that the Administration did not respect [the Applicant's] right to submit additional information relevant to [the Applicant's] suitability for the vacancy. While acknowledging that, had [the Applicant] submitted such additional information, there are no assurances that [the Applicant] would have been selected for the post, the Board nevertheless concluded that, as a result of the

> Administration's failure to invite [the Applicant] to submit such information, [the Applicant's] candidature for the post was not given full consideration."

IV. The Tribunal has consistently held that it will not substitute its judgement for that of the relevant bodies with regard to the performance or relative efficiency of candidates for selection to a post. Indeed, all choices are invariably subjective to some extent (see Judgement No. 554, *Fagan* (1992) para. XI). The Tribunal has consistently held that "qualifications, experience, favorable performance reports and seniority are appraised freely by the Secretary-General and therefore cannot be considered by staff members as giving rise to any expectancy (see Judgement No. 1056, *Katz* (2000) para. IV).

V. The Tribunal has also held that "the assessment of candidates for posts is a responsibility within the lawfully exercised discretion of the Respondent", for which it would not substitute its judgment (see Judgement No. 594, *Del Rosario-Santos* (1993), paragraph VI). Moreover, "decisions on promotions cannot be challenged on the ground of inadequate consideration of performance or length of service or on any other similar ground", but can only be reviewed on the grounds of abuse of authority, lack of due process, procedural or substantive errors, or other extraneous factors, and even then, only if such error is more than academic (see Judgement No. 312, *Roberts* (1983), and Judgment No. 677, *Daure* (1994), para. V).

VI. With respect to the Applicant's claim that the Administration improperly failed to convene a duly constituted promotion board, the Tribunal must point out that in the present case, no such requirement existed.

In a 14 April 1998 memorandum, the Chief of Administration, ICTR explained to the Applicant as follows:

> "During the period that the post was advertised, ICTR did not have delegation of authority for human resources management matters. Instead it was closely administered by OHRM, though the Registrar had delegated authority to select the successful candidates from the field of applicants to any vacant post. Since 1 October 1997, ICTR was granted delegation of authority and accordingly set up the appointment and promotion bodies to select locally all successful applicants to announced vacancies. As a result, none of the recruitment actions for ICTR posts are referred, even now, to the Headquarters appointment and promotion bodies ... I should like to reassure you that the selection of the incumbent for Chief Personnel Section was

> therefore made by the Registrar in accordance with the policies and procedures then in place for ICTR."

This is clearly in accord with the discretion of the Secretary-General to control the promotion process and delegate authority to OHRM or any other local body as he deems fit or necessary.

VII. In Judgement No. 310, *Estabial* (1983) para. XXII, the Tribunal found that the Applicant "shall be fairly compensated for failure of due process". The Applicant's "injury" must therefore not just be compensated, but "fairly compensated." In Judgement No. 764, *Simatos* (1996), para. VII, the Tribunal held that:

> "In the Tribunal's view, therefore, the Administration has disregarded the current rules, thus causing harm to the Applicant. The Tribunal finds that, as a result of ... failure to review the Applicant's candidacy, the Respondent denied her the full and fair consideration to which she was entitled under the Tribunal's jurisprudence. In the Tribunal's view, these violations give rise to a right to compensation."

The Tribunal finds a parallel in the Applicant's situation. He was qualified for the post and his application was not given the required full and fair consideration. Hence, this Tribunal finds that the Applicant merits additional compensation.

The Tribunal finds that while it will not generally substitute its judgment for that of the Secretary-General in matters relating to the efficiency or relative efficiency of candidates for promotion, in this case there has been a substantial procedural breach insofar as the Applicant's candidacy for the said P-5 post is concerned.

VIII. Therefore, the Tribunal holds that the Applicant should be awarded an additional $2,000 for the breach of substantive procedures, over and above the $3,000 recommended by the JAB, for the Administration's admitted failure to offer him the opportunity to submit additional information in connection with his candidacy for the above-mentioned P-5 post.

IX. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant compensation in the amount of $2,000, in addition to the compensation he already received; and,

2. Rejects all other pleas.

(Signatures)

Mayer **Gabay**
Vice-President, presiding

Omer Yousif **Bireedo**
Member

Jacqueline R. **Scott**
Member

Geneva, 21 July 2003

Maritza **Struyvenberg**
Executive Secretary

ASOMBANG